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FILED  
MAY 15 AM 9:18  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATE DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO-BRANCH

EDWARD E. ANDERSON,  
Plaintiff

Vs

AMR The parent of AMERICAN AIRLINES  
INC. AMERICAN AIRLINES and Does 1  
through 5, inclusive.  
Defendants

Case No. 07-459441-WGY

PLAINTIFF'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN OPPOSITION TO  
DEFENDANTS MOTION FOR SUMMARY  
JUDGMENT AND /OR SUMMARY  
ADJUDICATION OF CLAIMS AND OR  
JUDGMENT ON THE PLEADINGS;  
AND DECLARATION OF FREDERICK C.  
ROESTI;  
DECLARATION OF EDWARD E.  
ANDERSON

Date MAY 22, 2008  
8:30 AM Dktg  
Hon W. P. L. M.

**A. INTRODUCTION.**

Plaintiff is an African American, age 73, who has worked as a sky cap for American Airlines since 2001, when he filed his discrimination in January, 2006. At age 73, plaintiff was the oldest sky cap work worked for American Airlines, whether as an employee of American Airlines or as an employee of G-2, an independent contractor who provided sky caps to American Airlines. The next oldest was 60 years old, and the rest in their 50's or 40's or younger.

Over the years, the number of African American sky who worked for American

1 Airlines as employees or as employees of its independent contractor, has continued dwindle  
2 through attrition and the hiring practices of American Airlines and its independent contractor,  
3 who have not hired any new African American employees. Plaintiff is now the sole remaining  
4 African American sky cap on his shift.

5 In August, 2005, when American Airlines adopted a \$2 per baggage service fee to be  
6 collected by skycaps, Plaintiff was the principal skycap who publicly protested the \$2 per  
7 baggage fee because it would significantly reduce tip income, upon which sky caps depended  
8 for the major portion of their income. Plaintiff requested that he be restored to the six hour  
9 shift to make up for the lost tip income, that had been denied him since 2001.

10 On August 11, 2005, a supervisor from American Airline's met privately with Plaintiff  
11 and demanded that Plaintiff sign a letter agreeing the \$2 per baggage policy. Plaintiff was told  
12 to sign the letter or retire.

13 After Plaintiff refused to sign the letter, he was not terminated. Instead Plaintiff was  
14 treated like a pariah. He was assigned to the least desirable baggage station by himself, and  
15 isolated from other skycaps. Plaintiff was again denied a six hour shift, although other  
16 American Airline employees in all levels operation from baggage handler to station agent,  
17 were able to work six hour shifts. Plaintiff was prohibited for working at the other station  
18 where other sky caps worked, regardless of the circumstances. If his baggage checking  
19 machine broke down, plaintiff could do nothing but wait it to be fixed, while the other sky  
20 caps were not limited to one location, and if their machine broke down, they were allowed to  
21 use any machine that was available, including plaintiff's baggage check machine.

22 As a result of these actions toward plaintiff, plaintiff suffered a substantial reduction in  
23 tip income, and prestige among his fellow sky caps. By these actions, American Airlines  
24 sought to induce plaintiff to retire. Instead, in January, 2006, Plaintiff filed a discrimination  
25 complaint with the California Department of Fair Employment and Housing, alleging age and  
26 race discrimination, retaliation for exercising protected rights, and upon issuance of a Right to

27 Case No. 07-03527 WHA

28 Plaintiff's Memo of Ps and As

in Opposition to Summary Judgment 2

1 Sue Letter, plaintiff filed this action in State Court alleging age and race discrimination,  
2 harassment, retaliation for asserting protected rights, and negligent and intentional infliction of  
3 emotional distress. Plaintiff has also filed a timely motion to amend the complaint before the  
4 court to add a California Statutory Cause of Action, alleging that the \$2 baggage fee that was  
5 initiated by American Airlines in August, 2005 violates California Labor Code Section 351  
6 because it diverts gratuity income that belongs to the employee to the employer.

7 This court should deny defendant's motion for summary judgment and adjudication,  
8 and should grant plaintiff request for leave to amend the complaint to allege violation of  
9 California Labor Code Section 351.

#### 10 **B. STATEMENT OF FACTS**

11 Evidentiary Factual Allegation The factual evidence in support of plaintiff's allegation,  
12 and in opposition to defendant's Motion for Summary Judgment includes (1) The evidentiary  
13 factual allegation in Plaintiff's Verified Complaint, (2) The Declaration of Plaintiff filed  
14 herewith, (3) the Deposition of Plaintiff, (5) the Responses to Discovery provided by plaintiff,  
15 and (4) the Declaration of Frederick C. Roesti, and exhibits.

16 Status of Plaintiff Prior to American Airline's purchase of TWA, plaintiff worked a  
17 six hour shift for TWA as a sky cap. In 2001, under the terms of American Airline purchase  
18 of TWA, approved by a bankruptcy judge, former TWA sky caps, including Plaintiff, where  
19 to be come employees of American Airlines under a status quo agreement, which provided for  
20 the same working conditions, seniority, compensation, they enjoyed under the TWA contract  
21 until it expired by attrition. Other American Airlines sky caps were employees of an  
22 independent contractor, G-2, who provided sky caps to American Airlines. (Complaint,  
23 Anderson Deposition, Page 39, 69, 67, 142, 181; Anderson Declaration, par 3, 4)

24 In 2001, at the time of the purchase, there were approximately seven African American  
25 sky caps who worked for American Airlines, and on plaintiff's shift, there were three African  
26 American sky caps, including Plaintiff. The total number African American sky caps at

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2 American Airlines to plaintiffs knowledge has dwindled to two African American sky caps,  
3 including Plaintiff, and Plaintiff is the sole remaining African American sky caps on his shift  
4 This was the result of hiring practices due to attrition that have not hired African American  
5 sky caps since 2001 (Anderson Declaration, par 8-9)

6 In December 20, 2001, when American Airlines bought out TWA, American Airlines  
7 required the former TWA skycaps, including Plaintiff, to sign a letter that listed their income  
8 as \$10.46 per hour, and stated, "If you choose not to accept the above position or do not report  
9 for work when advised, you will have status with AA." Although plaintiff signed this letter,  
10 defendant American Airlines was still bound to the status quo agreement regarding terms of  
11 employment, gratuities, seniority, shift selection, etc. When supervisors for American  
12 Airlines disputed the continued operation of the status quo agreement, Plaintiff referred them  
13 to Dallas (the American Airline headquarter, and the supervisors reported back to Plaintiff that  
14 he was right (Anderson Deposition, 38-39). However, instead of placing plaintiff on a six  
15 hour shift, as he requested, plaintiff was told that American Airlines did not have six hour  
16 shifts, and the shift available to him was a four shift (Anderson Deposition, page 39-40). Later  
17 plaintiff learned that this representation was false. By August, 2005, plaintiff had learned that  
18 American Airlines allowed employees at all level of its operation to work six hours shifts from  
19 baggage handler, to ramp man, to station agent (Anderson Declaration)

20 August, 2005: Implementation of \$2 per bag service fee.

21 In August, 2005, American Airlines announced that it was instituting a \$2 dollar per  
22 bag baggage service fee, so that sky caps checked in baggage as they had done before, when  
23 customers paid tips to sky caps, the sky caps would now collect a \$2 per bag service fee from  
24 customers, and sky caps would turn the \$2 per bag fee over American Airlines, or G-2, in the  
25 case of sky caps wered for G-2 for American Airlines. Plaintiff was the pincipal sky cap who  
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1  
2 protested this new policy because it would significantly reduce tip income, that sky caps relied  
3 upon (Anderson Deposition, page 75-76, 89, 131-136). Plaintiff renewed his request for a six  
4 hour hour shift. In the normal of things, but for discrimination on the basis of age and race,  
5 Plaintiff would have been assigned to six hour shift from 8:00 a.m. to 2:00 p.m. since  
6 December, 2001, and from August, 2005 due to (1) his seniority, (2) the terms of the status  
7 quo agreement between American Airlines and TWA covering the skycaps, that was approved  
8 by a Bankruptcy Judge, and (3) the fact that Plaintiff was an employee of American Airlines  
9 under the status quo agreement, while other sky caps were employed by an independent  
10 contractor, G-2, that contracted with American Airlines to provide sky cap services (Anderson  
11 Deposition\_

12 When Defendant's agents approached Plaintiff, individually, to sign an agreement  
13 agreeing to the \$2 baggage fee, and plaintiff refused, Plaintiff was told to sign the agreement  
14 or retire.

15 Discrimination, Retaliation and Harassment,

16 Defendants did not retire plaintiff by termination, but they embarked on a course of  
17 action that treated him like a pariah. Plaintiff was assigned to the least desirable baggage  
18 station by himself, and isolated from other skycaps. Plaintiff was again denied a six hour  
19 shift, although other American Airline employees in all levels operation from baggage handler  
20 to station agent, were able to work six hour shifts. Plaintiff was prohibited for working at the  
21 other station where other sky caps worked, regardless of the circumstances. If Plaintiff's bag  
22 checking checking machine broke down, plaintiff was prohibited from working elsewhere. He  
23 could do nothing but wait it to be fixed, while the other sky caps were not limited to one  
24 location, and if their machine broke down, they were allowed to use any machine that was  
25 available, including plaintiff's baggage check machine (Anderson Deposition 39, 53-55, 74-  
26

76, 89-92, 98-102).

This conduct by American Airlines cut deeply into plaintiffs tip income, and its isolation of plaintiff, and discriminatory conduct toward him was observed by and is recorded in sworn statements of other skycaps. See Anderson Declaration.

#### Filing of Complaint

On January 24, 2006, Mr. Anderson filed his complaint of age and race discrimination, and claim of retaliation with DFEH. He received a right to sue letter, dated August 2, 2006. On January 9, 2007, Mr. Anderson filed the present complaint, alleging (1) Age discrimination in violation of FEHA, (2) Race discrimination in violation of FEHA, (3) Retaliation for exercising protected civil and employment rights in refusing to sign the August, 2005 letter in violation of FEHA, among other things (4) Negligent infliction of emotional damages, and (5) Intentional infliction of emotional damages, and with this opposition to defendant's motion for summary judgment, has filed a timely motion to amend the complaint to allege the \$2.00 baggage fee was improper diversion of skycap gratuities to American Airlines in violation of California Labor Code Section 351.

#### **C. ARGUMENT**

##### **1. This Court cannot grant summary judgment for defendant because there are genuine issues as to the material facts.**

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment only if there is a showing that there is no genuine issue as to any material fact can be shown that Plaintiff be able to prevail. In the present matter the Defendant wishes to side step the issues presented in this matter. Defendants provide declarations from several employees of American Airlines, but the declarations avoid the issues that are presented by Plaintiff in this case, and most present issues of fact for the trier of fact.

Furthermore, the declarations submitted on behalf of Defendant omit the factual allegations in Plaintiff's verified complaint. First Mr. Anderson was only allowed to work a four hour shift verses the original 6 hour shifts. Second he was allowed to move to the different areas until the August 2005 policy shifts. Then, Mr. Anderson was required to remain at only one location. Third the declarations fail to address the consequence of said policy, which is the basis of this action. Fourth, the declarations fail to mention the letter that Mr. Anderson was requested to sign when American Airlines was changing their policy in August, 2005. Finally, the declarations do not address the consequence of the new tip policy, nor do they address the allegations that Mr. Anderson was originally told they could not accept tips, and American Airlines supervisors took down the hand written signs by Plaintiff that the \$2 per bag service was not a tip, and did not go to skycaps. The disputed facts presented in this case require the court to deny Defendant's motion for Summary Judgment.

**2. Plaintiff is not barred by any Statute of Limitations under State Law.**

In this matter the first and second cause of action alleged several actions taken by Defendant against Plaintiff to show violation of the California fair Employment and Housing act (FEHA"). The Defendant focused only on one of the acts alleged acts by American Airlines and chooses to ignore the crux of the complaint to make their Statute of Limitation claim. Plaintiff ignores the crux of the complaint, i.e. what happened to plaintiff after the August, 2005 institution of its \$2 per bag service charge, and that when Mr. Anderson was requested to sign a letter of resignation, that Mr. Anderson was no longer allowed to move from his location. He was given a substandard location despite his seniorit, and that Mr. Anderson filed his complaint with California Deparment of Fair

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2 Employment and Housing in January 2006, received a right to sue letter in August 2006,  
3 and filed this complaint in state court in January 2007. The cases cited by Defendant,  
4 *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal App. 4<sup>th</sup> 1216,  
5 allowed the Plaintiff to proceed since the actions by the Defendant were material to his  
6 claims. In *Porter v. California Department of Corrections* 383 F3rd 1018 1031-1032  
7 (2004) also cited by the Defendant, the court ruled that the Summary Judgment motion  
8 granted in the District Court must be overturned. The *Porter* concerned a sexual  
9 harassment and retaliation case concerning Ms. Porter and the CDC. The court continuing  
10 the acts upon which the complaint was filed would be sufficient to defeat the Statute of  
11 Limitation problem.  
12

13 Finally, as defendants admit, the discriminatory conduct is not limited to what  
14 happened after August, 2005, but also extends back to December, 2001, because these  
15 were not "discrete acts" that were not repeated. They consisted of actions that followed  
16 August 1, 2005, including discriminatory actions that also August, 2001.  
17

### 18 **3. Age Discrimination**

19 Mr. Anderson a 73 year old African American man was treated differently than  
20 younger skycaps after he joined American Airlines, both before August, 2005 and after  
21 August, 2005. In addition to having fewer hours than the other skycaps, that limited him to  
22 working only four hour sifts, when the 2005 policy in baggage handling was modified and  
23 Mr. Anderson refused to sign the resignation letter he was treated to as a second class  
24 citizen, directed toward his age, to encourage him to retire or resign. This treatment caused  
25 him to earn less income and in fact to be separated from the rest of the skycaps. In *Horn v.*  
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2 *Cushman & Wakefield Western, Inc. (1999) 72 Cal App 4<sup>th</sup> 798 85 Cal Rptr 2d 459*, the  
3 court allowed Summary Judgment against the Plaintiff as a result of the termination of the  
4 employee because, in that case, there was a legitimate case of restructuring. Here, Mr.  
5 Anderson was not terminated. He was put in a less desirable position. The institution of  
6 the \$2 per bag service fee was not a restructuring, per se. The discrimination on the basis  
7 of age arose from the fact that he was singled out, required to work in one place, prohibited  
8 from changing location like other skycaps –after he was invited sign a letter of resignation,  
9 and refused.  
10

#### 11 **4. Race Discrimination**

12 Plaintiff alleges that Defendant took the actions against Mr. Anderson an African American  
13 was treated differently than the other skycaps. The specific allegations are set forth above.  
14 Clearly, American Airlines treatment of Mr. Anderson was attributed to a number of factors,  
15 and including its policy of excluding African American sky caps through it attrition and hiring  
16 practice from December, 2001, his age, and retaliation. In *Equal Employment Opportunity*  
17 *Commission v. Crown Zellerbach Corp* 720 F.2d 1008, 1014-1016 (1983) the court ruled that  
18 a defendant must be able to articulate a legitimate, nondiscriminatory reason for its actions. In  
19 the present matter no such articulation has been forth coming from Defendant.  
20

#### 21 **5. Retaliation**

22 American Airlines embarked upon a new more virulent level of discrimination once Mr.  
23 Anderson refused to sign the letter of resignation, and when Mr. Anderson protested the \$2  
24 baggage service and other fees, that affected sky cap income. Mr. Anderson was no longer  
25 allowed to be where the bulk of the passengers were being loaded, nor was he able to use any  
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1  
2 machine if his was broken. The booth used by Mr. Anderson was on wheels so he could have  
3 moved to where the passengers were loading, but for American Airlines refusal. American  
4 Airlines did not want to have Mr. Anderson around any longer and they felt their action would  
5 cause him to quit. In *Vasquez v. County of Los Angeles*, (2001) 349 F.3<sup>rd</sup> 349 the court stated  
6 that the Defendant must offer a legitimate reason for changing its policy towards Plaintiff.  
7 Unlike the *Vasquez* case Mr. Anderson position was not changed nor was he fired because of  
8 his work. He has presented a present a prima facia case sufficient to withstand summary  
9 judgment because the actions of American Airlines occurred after he refused to sign a letter of  
10 resignation.  
11


#### 12 **6. Intentional and Negligence Infliction of Emotional Distress**

13 Defendant cites *Fermino v. Fedco Inc.*(1994) 7 Cal 4<sup>th</sup> 701 30 Cal Rptr. 2d 18 in its  
14 brief to avoid intentional infliction of emotional distress. The court in that case allowed a  
15 charge of false imprisonment to go forward despite the Defendants claim that under workers  
16 compensation law provided the exclusive remedy. The court stated that acts that are not in the  
17 normal course of business can not be defeated by demur. Furthermore, here, apart from the  
18 discrimination allegations, there is sufficient evidence to support he intentional or the negligent  
19 infliction of emotional distress.  
20

#### 21 **D. CONCLUSION**

22 For all of the above reasons, the defendant's motion for summary judgment must be  
23 denied.

24 Dated: May 15, 2008

Submitted by:   
Frederick C. Roesti, attorney for Plaintiff Edward Anderson

**PROOF OF SERVICE BY FAX AND MAIL**

I, the undersigned declare:

I am over the age of eighteen. I am not related to the parties in this action. I may be reached at the Law Office of Frederick C. Roesti, 1095 Market Street, San Francisco, CA 994103, Tel (415) 552-3733.

I served the the following documents:

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT;

DECLARATION OF EDWARD ANDERSON:

DECLARATION OF FREDERICK C. ROESTI

By FAX and by MAIL as follows: I faxed the documents to the following fax number and I mailed documents by placing them in an envelope with postage paid and placed in the United States Mail addressed to:

Fax (916) 561-0828  
Kenneth R. O'Brien, Esq,  
Littler Mendelson  
2520 Ventura Oaks Way, Suite 390  
Sacramento, CA 95833-4227  
on the date listed below.

I have read the above statement and declare under penalty of perjury under the laws of the State of California that it is true and correct and was executed in San Francisco, California on May 15, 2007



Frederick C. Roesti

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